



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: SEPTEMBER 28, 2022

IN THE MATTER OF:

Appeal Board No. 623897

PRESENT: RANDALL T. DOUGLAS, MEMBER

In Appeal Board No. 623897, the claimant appeals from the decisions of the Administrative Law Judge filed May 13, 2022, insofar as they sustained the initial determination holding the claimant ineligible to receive benefits, effective beginning March 9, 2020 through January 31, 2021, on the basis that the claimant was not totally unemployed.

In Appeal Board No. 623898, the claimant appeals from the decisions of the Administrative Law Judge filed May 13, 2022, insofar as they sustained the initial determinations charging the claimant with an overpayment of \$13,104 in regular unemployment benefits, and \$3,024 in extended benefits, both recoverable pursuant to Labor Law § 597 (4); an overpayment of Pandemic

Emergency Unemployment Compensation (PEUC) benefits (inadvertently stated in the determination as EUC08 benefits) in the amount of \$6,552 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; an overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits of \$11,700 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and an overpayment of Lost Wages Assistance (LWA) benefits of \$1,800 recoverable pursuant to 44

CFR Sec. 206.120 (f)(5).

In Appeal Board No. 623899, the claimant appeals from the decisions of the Administrative Law Judge filed May 13, 2022, insofar as they sustained the initial determination reducing the claimant's right to receive future benefits

by 368 effective days and charging a civil penalty of \$2,419.20 on the basis that the claimant made willful misrepresentations to obtain benefits.

At the combined telephone conference hearings before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There was an appearance by the claimant.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant was employed full-time as an assistant engineer by GEICO, beginning in 1997 and continuing at least through the date of the hearing on May 13, 2022. The claimant worked five days a week, eight hours a day, and was paid a base yearly salary of more than \$83,000.

Prior to filing a claim for unemployment benefits in May 2020, the claimant also worked as an UBER driver. When that work slowed down or stopped due to the pandemic, the claimant filed a claim for unemployment benefits on May 13, 2020, effective March 9, 2020, establishing a weekly benefit rate of \$504. It was the claimant's understanding that the government had made federal benefits available for individuals who were independent contractors or self-employed working for platforms such as UBER. The claimant knew that he needed to certify each week to obtain benefits.

Screen shots seen by the claimant when he applied for benefits online and certified weekly for benefits, advised the claimant of "9 Things You Must Do When Filing For Unemployment Insurance," which included "Report each day you work," "Be accurate," and "Read your Claimant Handbook." Each week's certification also gave the claimant a chance to review his responses. The handbook available to the claimant online provided further assistance in connection with weekly certifications, including a list of 10 most common issues that would negatively affect his benefits, one of which was "Work while collecting." The relevant pages of the handbook also provided a definition of what is considered work, indicating that ""Any activity that brings in or may bring in income at any time must be reported as work. . ." and includes "working for someone else."

On June 19, 2020, the claimant certified by phone for the week ending June 14, 2020; in response to the question of how many days he had worked that week, the claimant responded "0." On July 9, 2020, the claimant certified for the week ending July 5, 2020, indicating he had worked "0" days. On July 21, 2021,

the claimant certified for benefits for the weeks ending March 15, 2020 through the week ending May 17, 2020, and for the week ending July 19, 2020. For each of these 11 weeks, the claimant certified that he had worked "0" days. The claimant's certification record report does not reflect that he certified for benefits on July 28, 2020. Beginning August 4, 2020 through January 3, 2021, the claimant certified each week for benefits, for the weeks ending August 2, 2020 through the week ending January 3, 2021. For each of these 23 weeks, the claimant was asked to report the number of days he had worked the prior week, and each week, the claimant responded "0."

The claimant responded this way, even though he continued to work full time for GEICO, because he did not think he did not think the questions applied to him, since he did not think he was applying for unemployment benefits, but for the federal benefits made available to workers in the driver platform industry. The claimant "did not pay attention" to the information on the website, which set forth "9 Things You Must Do When Filing For Unemployment Insurance," requiring him to report all days worked.

As a result of his certifications, the claimant received regular unemployment benefits totaling \$13,104; Pandemic Emergency Unemployment Compensation (PEUC) benefits totaling \$6,552; Extended Benefits (EB) totaling \$3,024; Federal Pandemic Unemployment Compensation (FPUC) benefits totaling \$11,700; and Lost Wage Assistance (LWA) benefits totaling \$1,800 paid for the weeks ending March 15, 2020 through the week ending January 31, 2021.

OPINION: The credible evidence establishes that the claimant was employed full-time, working five days a week, eight hours a day during the period at issue, from March 9, 2020 through January 31, 2021, and continuing through at least the day of the hearing. Accordingly, the claimant was not totally unemployed, and therefore is not eligible to receive state or federal unemployment benefits of any kind. The fact that the claimant's work as an UBER driver may have slowed or stopped as a result of the COVID-19 public health emergency does not alter the fact that he remained employed on a full-time basis with another employer, and therefore lacked the total unemployment necessary to establish eligibility for benefits under the Labor Law.

Since the claimant is not eligible, he was not entitled to receive the state and federal benefits he received, and those benefits were overpaid. The overpaid Federal benefits (PEUC, FPUC, and LWA) are recoverable as a matter of

law under the provisions of the CARES Act and the Code of Federal Regulations, regardless of fault on the part of the claimant. Accordingly, these overpaid federal benefits in the amounts of \$6,552 in PEUC, \$11,700 in FPUC, and \$1,800 in LWA must be repaid by the claimant.

The evidence also establishes that when the claimant certified for benefits for the weeks ending March 15, 2020 through the week ending January 3, 2021, he reported to the Department of Labor that he had not worked any days. These certifications were factually false, since it is undisputed that the claimant continued to be employed on a full-time basis, working five days a week. Since the claimant knew he was working, and since the certification question regarding how many days he had worked is straightforward, and requires no specialized legal knowledge to accurately answer, his false statements when certifying for these weeks were also wilful misrepresentations. The claimant's misapprehension about what benefits he had applied for does not excuse his failure to accurately report the days he worked when certifying for benefits for each of the weeks at issue.

Since the evidence establishes that the claimant made factually false statements when certifying for benefits for the weeks ending March 15, 2020 through the week ending January 3, 2021, the regular unemployment and extended benefits the claimant received during that period are recoverable under the provisions of Labor Law Section 597 (4). However, the initial determination does not assert that the claimant falsely certified after the week ending January 3, 2021. Therefore, we find that the extended benefits paid to the claimant after that date and before January 31, 2021 (four weeks) are not recoverable. Accordingly, the initial determination charging the claimant with a recoverable overpayment of extended benefits after January 3, 2021, shall be modified to charge the claimant with the overpayment of extended benefits paid through January 3, 2021 only. The amount of recoverable extended benefits shall be referred to the Department of Labor for recalculation consistent with our decision.

Similarly, the wilful misrepresentation determination calculates the number of forfeit days based upon the entire period of the claimant's ineligibility, from March 9, 2020 through January 31, 2021, although the determination does not refer to any certifications after January 3, 2021. In addition, the initial determination refers to six (6) separate willfully false certifications made by the claimant on July 28, 2021, although the record fails to establish that any certifications were made by the claimant on that

date. Thus, the number of forfeit penalty days shall also be modified, to remove the six instances of certifications made on July 28, 2020, and limit the period to certifications made to the period beginning March 9, 2020 through the week ending January 3, 2021, only. The number of forfeit penalty days assessed shall be referred back to the Department of Labor for recalculation consistent with the Board's decision herein.

Finally, since the civil penalty is calculated based upon the amount of recoverable regular and extended benefits, and since the amount of extended benefits is modified, the amount of civil penalty shall also be referred back to the Department of Labor for recalculation consistent with our decision herein.

The claimant's repeated contention that his work with UBER was not employment is neither relevant to the issues before us, nor accurate, as the courts and the Board have held that for unemployment insurance purposes, there is an employment relationship between UBER and its drivers and couriers. See, *Matter of Lowry (Uber Tech., Inc.)*, 189 AD3d 1863 (3d Dept. 2020); and Appeal Board No. 610031. The claimant's

receipt of a 1099-G form from the State has no bearing upon the issues that were before the hearing Judge and are before the Board.

DECISION: In Appeal Board Nos. 623897, 623898, and 623899, the decisions of the Administrative Law Judge, insofar as appealed from, are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 623897, the initial determination holding the claimant ineligible to receive benefits, effective beginning March 9, 2020 through January 31, 2021, on the basis that the claimant was not totally unemployed, is sustained.

In Appeal Board No. 623898, the initial determinations charging the claimant with an overpayment of \$13,104 in regular unemployment benefits, recoverable pursuant to Labor Law § 597 (4); an overpayment of Pandemic Emergency

Unemployment Compensation (PEUC) benefits (inadvertently stated in the determination as EUC08 benefits) in the amount of \$6,552 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; an overpayment of Federal Pandemic Unemployment

Compensation (FPUC) benefits of \$11,700 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and an overpayment of Lost Wages Assistance (LWA) benefits of \$1,800 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), are sustained.

In Appeal Board No. 623898, the initial determination charging the claimant with an overpayment of \$3,024 in extended benefits, recoverable pursuant to Labor Law § 597 (4), is modified to reduce the amount of recoverable extended

benefits to those paid through January 3, 2021 only, and as so modified that determination is sustained. The amount of recoverable overpaid extended benefits is referred back to the Department of Labor for recalculation.

In Appeal Board No. 623899, the initial determination reducing the claimant's right to receive future benefits by 368 effective days, and charging a civil penalty of \$2,419.20 on the basis that the claimant made willful misrepresentations to obtain benefits, is modified to reduce the number of forfeit days to remove six instances of wilful misrepresentation, and to reduce the amount of the civil penalty consistent with the decision herein, and as so modified is sustained. The number of forfeit days and the amount of the civil penalty are referred back to the Department of Labor for recalculation.

The claimant is denied benefits with respect to the issues decided herein.

The amount of recoverable, overpaid extended benefits, the number of forfeit penalty days, and the amount of the civil penalty owed, are referred to the Department of Labor for recalculation consistent with this decision.

RANDALL T. DOUGLAS, MEMBER